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No. 99-5

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1999**

CHRISTY BRZONKALA

*Petitioner,*

v.

ANTONIO J. MORRISON, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## MOTION TO FOR LEAVE TO FILE BRIEF AND AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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## MOTION TO FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Association of Trial Lawyers of America ("ATLA") respectfully moves this Court for leave to file the accompanying brief as amicus curiae in support of the Petitioner. Petitioner and Respondent Morrison have granted consent to the filing of this brief. Respondent Crawford has not.

This case is of great importance to ATLA, its members and their clients.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent injured plaintiffs in civil actions. Among those plaintiffs are



victims of gender-motivated violence seeking compensation and other relief under 42 U.S.C. § 13981, the civil remedy provided in the Violence Against Women Act of 1993. ATLA and its members therefore have a significant interest in this Court's resolution of the issue of the constitutionality of that statutory remedy.

ATLA also believes that its contribution through this brief will assist this court. Since 1946, ATLA and its members have been active participants in the development of tort remedies at common law and by statute. That development has shown that tort remedies serve an important function as a supplement to criminal penalties in areas where criminal law enforcement and regulation have been inadequate. In ATLA's view, the federal civil remedy in § 13981 serves a similar corrective purpose. It therefore is within the scope of Congress' authority to enforce the rights guaranteed by the Fourteenth Amendment.

Respectfully submitted,

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## AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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## IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from parties granting consent and a motion for leave to file this brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.



injured plaintiffs in civil actions. Among those plaintiffs are victims of gender-motivated violence seeking compensation and other relief under 42 U.S.C. § 13981, the civil remedy provided in the Violence Against Women Act of 1993. ATLA and its members therefore have a significant interest in this Court's resolution of the issue of the constitutionality of that statutory remedy.

ATLA also believes that its contribution through this brief will assist this court. Since 1946, ATLA and its members have been active participants in the development of tort remedies at common law and by statute. That development has shown that tort remedies serve an important function as a supplement to criminal penalties in areas where criminal law enforcement and regulation have been inadequate. In ATLA's view, the federal civil remedy in § 13981 serves a similar corrective purpose. It therefore is within the scope of Congress' authority to enforce the rights guaranteed by the Fourteenth Amendment.

## SUMMARY OF THE ARGUMENT

1. Congress enacted 42 U.S.C. § 13981, providing a civil remedy against the perpetrators of gender-motivated violence following extensive hearings. Congress found that state justice systems were not enforcing legal protections against violence that predominantly affects women, compared to other crimes of violence. As part of its program to enforce equal protection under the law for women, Congress provided a civil remedy under which victims of gender-motivated violence can obtain compensatory and punitive damages and other relief.

This civil remedy falls well within the scope of the power conferred on Congress by § 5 of the Fourteenth Amendment to enact appropriate legislation to enforce the rights guaranteed by the amendment. The fact that the remedy permits an action against private persons does not place in outside the limits of Congress' authority. Although

the prohibitions in § 1 extend only to state action, the enforcement power given to Congress in § 5 is not.

2. Congress acts within the proper scope of its authority under § 5 when there is congruence and proportionality between the deprivation of rights identified by Congress and the means Congress employs to remedy that harm. Failure on the part of states to provide equal protection of the law on the basis of gender is clearly a deprivation of rights under the Fourteenth Amendment. Congress made extensive and detailed findings that bias in state law, police, prosecutors and courts result in inadequate enforcement for crimes that predominantly affect women.

The means Congress has chosen to remedy this inadequacy constitutes only a slight intrusion into state autonomy. The remedy extends only to violent conduct that is already punishable under state law. It does not overturn any state criminal law or tort remedy. And Congress took care to avoid intrusion into matters of particular state interest, such as domestic relations.

3. Providing a civil remedy represents a reasonable step toward correcting inadequate enforcement of criminal law with respect to gender-motivated crimes. It has historically been a function of tort remedies, including punitive damages, to serve as a corrective supplement to criminal penalties, particularly in areas in which criminal law enforcement has been inadequate.



## ARGUMENT

### I. THE CIVIL REMEDY AGAINST PRIVATE PERSONS IS WITHIN CONGRESSIONAL POWER TO ENFORCE THE FOURTEENTH AMENDMENT GUARANTEE OF EQUAL PROTECTION OF THE LAW

#### A. Congress Enacted the Civil Remedy To Enforce the Civil Right of Women to Equal Protection of the Laws Guaranteed by the Fourteenth Amendment.

Congress enacted the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in various sections of 18 U.S.C. and 42 U.S.C.), following four years of extensive hearings. Congress found gender-motivated violence to be widespread in America. Equally dismaying, and perhaps more critical, Congress found that state criminal and civil justice systems did not adequately protect women against gender-based violence. To correct what it determined to be a failure among the states to carry out their obligation under the Fourteenth Amendment to provide equal protection under the law, Congress enacted an extensive program of corrective measures. Part of that effort is 42 U.S.C. § 13981, which grants the victim a civil remedy against the perpetrator of gender-motivated violence, permitting recovery of compensatory damages, punitive damages, injunctive and other relief.[2]

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[2] 42 U.S.C. § 13981:

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

Congress did not rely solely, or even primarily, on its ›mmerce Clause power in enacting the statute. Congress /oked "the affirmative power of Congress to enact this part der section 5 of the Fourteenth Amendment to the ›nstitution, as well as under section 8 of Article I of the ›nstitution." 42 U.S.C. § 13981(a). Indeed, Congress' goal enacting the civil remedy, expressed throughout an :tensive legislative record, was to place gender-motivated .olence on a par with traditional civil rights violations. See,

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.ll persons within the United States shall have the right to be free from rimes of violence motivated by gender (as defined in subsection (d) of ıis section).

c) Cause of action

\ person (including a person who acts under color of any statute, ›rdinance, regulation, custom, or usage of any State) who commits a :rime of violence motivated by gender and thus deprives another of the :ight declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section--

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means--

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.



e.g., Sen. Rep. 103-138, 103d Cong., 1st Sess. 48-49 (1993)[hereinafter "Senate Report 1993"].

The Fourteenth Amendment states, in part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Further, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

In ATLA's view, the Act was clearly a valid exercise of Congress' broad enforcement power under Section 5. For that reason, this Court need not determine whether the Act was also within Congress' authority to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

The lower court portrays its decision as dictated by "the principles of limited federal government upon which this Nation is founded" and disparages as "modern" and "expedient" any inroads by the national government on state autonomy. *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 826 (4th Cir. 1999)(en banc). ATLA suggests that those who crafted the Constitution to replace the failed Articles of Confederation did not establish a national government that would be powerless to enforce federal rights in the face of inaction by the States.

Moreover, the appropriate historical framework is the period following the Civil War, a period of overriding concern with the "unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others." *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973); *see also, Monroe v. Pape*, 365 U.S. 167, 175 (1961). It is hardly a "modern" notion that the Thirteenth and Fourteenth Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." *Ex parte Virginia*, 100 U.S. 339, 345 (1880).

**B. Congress' Authority to Enforce Fourteenth Amendment Rights Is Not Limited to Regulation of State Actors.**

The lower court's decision that Congress lacked the authority to provide a civil remedy against the perpetrators of gender-motivated violence is premised almost entirely on the proposition that "Congress may not regulate purely private conduct pursuant to its Fourteenth Amendment enforcement power." 169 F.3d at 862.

The lower court canvasses the precedents of this Court for the unexceptional proposition that "'[b]ecause the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action,'" 169 F.3d at 826, quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). However, this Court has never held that when Congress perceives such a violation its remedy must be limited to direct regulation of the state actors themselves.

ATLA contends that Congress' enforcement power is not so confined. The prohibitions of the Fourteenth Amendment encompass only action "fairly attributable to the state," *Lugar* at 937. But the text of Section 5 places no equivalent restriction on the means Congress may choose to remedy state violations. Indeed, this Court has broadly described the Enforcement Clause as "a positive grant of legislative power." *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997), quoting *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966). Limiting congressional remedies to prohibiting conduct already proscribed in Section 1 would render the enforcement powers conferred by this broadly drafted constitutional provision largely superfluous. *See* Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 257-59 (1971) (limiting Congress' Section 5 powers to scope of Section 1 would defeat the purpose of the enforcement clause and would merely enable Congress to replicate what judiciary is bound to do).



The Court in the Civil Rights Cases, 109 U.S. 3 (1883), clearly understood the enforcement provision to confer authority on Congress beyond legislating against action already prohibited prohibition in section 1. The Court explained that the Fourteenth Amendment:

> nullifies and makes void all state legislation, and state action of every kind, which . . . denies to any [citizen] the equal protection of the laws. It not only does this, but, . . . the last section of the amendment invests congress with power to . . . adopt appropriate legislation for *correcting the effects of such prohibited state law and state acts*, and thus to render them effectually null, void, and innocuous."

109 U.S. at 11 (emphasis added). Surely a federal remedy to correct the effects of state failure to enforce criminal penalties for crimes predominantly affecting women falls within that description.

The fact that the violent acts do not themselves violate the Fourteenth Amendment because they were committed by private persons does not place them beyond the reach of Congress' enforcement power. In *District of Columbia v. Carter*, 409 U.S. 418 (1973), a unanimous Court ruled that the judicially enforced prohibitions of Section 1 do not extend to private conduct. However, the Court added: "This is not to say, of course, that Congress may not proscribe purely private conduct under §5 of the Fourteenth Amendment." *Id.* at 424 n.8, citing *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring); id., at 782-84 (Brennan, J., concurring and dissenting).

Recently, and on several occasions, this Court has restated this broad view of Congress' authority under § 5:

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes

> into legislative spheres of autonomy previously reserved to the States.

*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* 119 S.Ct. 2199, 2206 (1999); *Lopez v. Monterey County,* 119 S.Ct. 693, 703 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

The power of Congress under § 5 is not unbounded, of course. But its scope is not defined by the distinction between public and private action. Rather, this Court has stated that Congress acts within its § 5 authority where there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne,* 521 U.S. at 518.

ATLA submits that 42 U.S.C. §13981 falls well within the scope of Congress' authority.

## II. THE CIVIL REMEDY REFLECTS A CONGRUENCE AND PROPORTIONALITY BETWEEN THE HARM IDENTIFIED BY CONGRESS HARM AND MEANS EMPLOYED TO REMEDY IT

The Court in *Boerne* explained the limits on Congress' authority under § 5 of the Fourteenth Amendment: "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.* at 519. That power is, ultimately, the Court's. *Id.* at 536. The Court explained that, while this distinction

> is not easy to discern, and Congress must have wide latitude in determining where it lies, . . . [t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

*Id.* at 519-20.



The Court applied this standard in a two-step fashion, looking first to whether Congress identified significant deprivations of rights protected by the Fourteenth Amendment, and then to whether the intrusion into state affairs is proportionate to the harm. *See Florida Prepaid,* 119 S. Ct. at 2207.

With respect to the Religious Freedom Restoration Act of 1993, the Court in *Boerne* the Court found the legislative record lacked examples of religious persecution or laws enacted out of religious bigotry, quoting the comment of one congressional witness that "deliberate persecution is not the usual problem in this country." 521 U.S. at 530. Second, the Court found that the statute resulted in sweeping intrusions at all levels of government, displacing laws, prohibiting official actions and imposing heavy litigation burdens on the states. The Court concluded that this interference with state governance was so out of proportion to the harm that the statute appeared "to attempt a substantive change in constitutional protections." *Id.* at 532.

By contrast, ATLA suggests, the substantial evidence of state inability to provide equal protection for women documented in the legislative record, weighed against the civil remedy's minimal intrusion into state governance, demonstrates the constitutionality of 42 U.S.C. §13981.

### A. Congress Made Extensive Findings of Widespread Inadequacy of State Protection Against Gender-Motivated Violence

The harm identified by Congress was widespread inadequacy of state enforcement of penalties and remedies for those acts of violence that predominantly affect women. The House Conference Report stated that "bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are

entitled. H.R. Conf. Rep. No. 103-711 (1993), at 385. The Senate Report elaborates:

> Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination. Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than crimes affecting men. [C]ollectively, these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims.

Senate Report 1993, at 49.

The right to equal enforcement of the law regardless of gender is clearly within the rights guaranteed by the Fourteenth amendment. Since 1971 "this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender or based on or based on 'outdated misconceptions.'" *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 135 (1994) (citations omitted).

During the past 25 years, with few exceptions, the Court has invalidated nearly every classification based on gender presented to it. The "core instruction of this Court's pathmarking decisions" has been that those "who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action. *United States v. Virginia*, 518 U.S. 515, n.4 (1996). Writing for the Court, Justice Ginsburg added, [t]oday's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, 'our Nation has had a long



and unfortunate history of sex discrimination.' *Id.* at 531, citing *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

The lower court however, disputed the congressional findings:

> If anything, the hearings and reports on section 13981 bear out that the States and state law enforcement officials . . . have undertaken the most fervent, and sincere efforts to assist victims of rape and domestic violence and that despite such efforts subtle prejudices and stereotypes among society at large continue to prevent women from filing criminal complaints, bringing suit, and otherwise obtaining vindication through the legal system.

169 F.3d at 885 (internal quotations and citations omitted).

Even allowing for the style of hyperbole that the opinion below appears to favor, this characterization of the legislative record appears to amicus as bizarre.

In fact, Congress made detailed findings concerning "existing bias and discrimination in the criminal justice system." H.R. Conf. Rep. No. 103-711, at 385. Petitioner has presented a detailed examination of the legislative record and ATLA will not burden the Court with its repetition. Of particular significance, however, is the fact that Congress found specific discrimination in many areas of state justice systems.

These include state criminal laws, such as the marital rape exception which bars prosecution for rape of a spouse or intimate partner or, in some states, imposes reduced penalties compared with nonmarital rape. See Senate Report 1993, at 42 (1993); Sen. Rep. No. 102-197, 102d Cong., 1st Sess., at 45 n.50 (1991). Even where these laws are modernly phrased in gender-neutral terms, they obviously disadvantage women in almost all instances.

Congress also found examples of unequal treatment in the practices and policies of police, prosecutors and the

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courts. Senate Report (1993) at 42-47. Congress concluded that:

> Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination.
>
> Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than crimes affecting men. Collectively, these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims.

Senate Report . No. 103-138 (1993) at 49.

ATLA suggests that the conclusions of Judge Shanahan of the District of Nebraska represent a more accurate characterization of the congressional findings:

> The legislative history surrounding VAWA evidences a congressional perception that states are failing to protect the equal rights of women from the immense and invidious problem of gender based violence. Congress carefully documented the problem of state inaction and made extensive findings regarding the states' inadequacies in addressing the problem of violence against women.

*Timm v. Delong*, No. 8:98CV43 (D. Neb. June 22, 1998).

Significantly, support for Congress' findings also came from the states. The studies referred to above included reports prepared by gender bias task forces in 17 states. Senate Report (1993) at 49. Congress also received a letter signed by the attorneys general of 38 states stating "the current system for dealing with violence against women is inadequate" and urging the creation "of a federal civil rights remedy for the victims of gender-based crimes." *See* Crimes of Violence Motivated by Gender: Hearing Before the



Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong. 34-36 (1993) (Letter from State Attorneys General).

**B. The Civil Remedy is Not Out of Proportion to the Harm to be Remedied**

The second step undertaken by the *Boerne* Court was to ask whether the remedy chosen by Congress was congruent with and in proportion to the harm. In *Boerne*, the Court was faced with a statute that cut a broad swath through state government, overturning numerous state laws and imposing extensive litigation costs on the states.

By contrast, the civil remedy set forth in 42 U.S.C. § 13981 overturns no state laws. It does not command the states to repeal the marital rape exception, spousal immunity doctrine or any of the formal legal barriers that disproportionately disadvantage female victims of gender-motivated violence. Nor does the statute command the executive officers of the states to alter their prosecutorial policies or police practices to treat crimes that tend to victimize women on a par with other criminal activity. The section merely allows the victims of crime to seek compensatory and other damages from the perpetrators in a private civil lawsuit.

Nor did Congress attempt to expand the type of conduct the states are obliged to protect against. Section 13981 provides a remedy only for violence that is already punishable as a felony under state law. Congress specifically defines a "crime of violence," as "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18." 42 U.S.C. § 13981(d)(2).

The lower court points out that this provision includes offenses constituting federal felonies when committed within

the federal jurisdiction, such as murder, rape, assault and kidnapping, other violence punishable if committed on federal lands, 169 F.3 at 842. Obviously, this provision does not seek to control conduct that is not otherwise punishable under state law.

The lower court relied heavily on this Court's statement that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" 169 F.3d at 840, quoting *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) The civil remedy contained in 42 U.S.C. § 13981, however, is not a criminal statute. It displaces no state criminal law and does not criminalize any conduct.

Nor does the civil remedy for gender-motivated violence impose new or additional punishment for conduct that, by definition, is already regulated by the state. Virtually all violent conduct that inflicts or threatens physical harm to a person that would be punishable as a felony also constitutes an intentional tort under state law. Plaintiffs are free to elect a remedy under state law or federal law -- though they are not entitled to double recovery for the same injury. The federal civil remedy merely reinforces the state's own policy, evidenced in the law of torts, against tortious injury.

Nor does the statute directly supersede or impermissibly infringe on the states' authority to regulate family law matters. Congress expressly provided that the statute confers no "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." 42 U.S.C. § 13981(e)(4).

Congress clearly intended this congruence between state and federal regulation to provide assurance that federal rights would be protected. "Each and every one of the existing civil rights laws covers an area in which some



aspects are also covered by State laws. What State laws do not provide, and cannot provide by their very nature, is a national antidiscrimination standard." Sen. Rep. No. 102-197 (1991) at 49.

In sum, Congress tread carefully in enacting 42 U.S.C. § 13981 to avoid intrusion into state areas of responsibility.

## III. CIVIL REMEDY IS A REASONABLE MEANS TO REMEDY INADEQUACY OF STATE CRIMINAL AND CIVIL ACTIONS IN PROTECTING FEDERAL RIGHT TO EQUAL PROTECTION UNDER THE LAW.

### A. Congress' Choice of Remedies to Enforce Equal Protection for Women Is To Be Accorded Deference.

The lower court, having remonstrated against federal action that might impact the states in even the most indirect fashion appears to state that the only appropriate course of enforcement for Congress is to overturn state laws and other barriers to equal protection for women outright. See 169 F.2d at 885.

ATLA submits that the path chosen by Congress, to provide a civil remedy to victims of gender-motivated violence without broad and sweeping intrusion into state government, represents a reasonable means for remedying the harm of inadequate enforcement of federal rights by the states. Regardless of whether the court would agree that this remedy is the optimum policy Congress could devise, it is sufficient under the Fourteenth Amendment that the court is "able to perceive a basis upon which the Congress might resolve the conflict as it did." *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). This deferential standard is consistent with the "rational basis" review of congress' enforcement efforts under other constitutional authority. See *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (Fifteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409,

440 (1968) (Thirteenth Amendment); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (Commerce Clause); *Katzenbach v. McClung,* 379 U.S. 294, 309 (1964)(Commerce Clause).

**B. Civil Remedies Serve as a Corrective Supplement to Remedy Inadequate Enforcement of Criminal Penalties.**

The court below expresses disbelief that Congress meant what it said regarding the purpose of the civil remedy.

> That section 13981 provides a remedy only against private individuals who commit violent crimes is significant, and perhaps dispositive, evidence that section 13981 does not truly aim at correcting unequal and unconstitutional enforcement of the laws by the States, but aims instead only to remedy or deter the underlying acts of violence to which that liability attaches

The court holds an unduly narrow view of the means Congress may employ under § 5. As early as the Civil Rights Cases, 109 U.S. 3 (1883), this Court understood that Congress had not only the authority to ban discrimination by the states, but also to correct its effects:

> [T]he last section of the amendment invests congress with power to . . . adopt appropriate legislation for *correcting the effects of such prohibited state law and state acts*, and thus to render them effectually null, void, and innocuous."

109 U.S. at 11 (emphasis added). By providing an alternative federal remedy, 42 U.S.C. § 13981 takes a step toward nullifying the effects of state barriers to legal recourse.

The fact is that civil tort remedies have long served as a supplement to state criminal penalties, regularly applied by state courts as a necessary corrective measure in areas where criminal law enforcement is lax or inadequate. See Charles McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C. L. Rev. 129, 130 (1929-30)(punitive



damages serve purpose of deterring and punishing conduct that is criminally punishable, but which as practical matter, prosecutors tend to ignore); Samuel Freifield, *The Rationale of Punitive Damages,* 1 Ohio St. L.J. 5, 7 (1935) (the common law origin of punitive damages was to supplement the criminal law as a form of public outrage at conduct otherwise undeterred by the criminal law); Clarence Morris, *Punitive Damages in Tort Cases,* 44 Harv. L. Rev. 1173, 1178 (1931) (tort plaintiffs may succeed in vindicating their own rights where prosecutors do not share the same goals).

As one state court has stated this tort remedy:

> tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished, by the criminal law.

*Luther v. Shaw,* 157 Wis. 234, 238 (1914).

See also, *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 820, 174 Cal.Rptr. 348, 389 (1981) ("It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of mass produced defective products that punitive damages must be of sufficient amount to discourage such practices); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186, 384 N.E.2d 353, 359 (1979) (where criminal sanctions "would do little to discourage the practice of retaliatory discharge," of workers, punitive damages are appropriate).

In the view of the lower court, "the victim's ability to obtain some small measure of justice through federal damages suits against the rapist would hardly eliminate or correct the State's constitutional violations." 169 F.3d at 885.

This view that a civil action to vindicate one's right to equal protection can make little impact is strikingly cynical in an era that can count *Brown v. Board of Education*, 347 U.S. 483 (1954), as one of the most influential decisions. Congress was not required to share that view.

## CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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